STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 2, 2006
v	No. 258071 Oakland Circuit Court
DUANE ALLEN MILLS, Defendant-Appellant.	LC No. 2004-196241-FC

Before: Hoekstra, P.J., and Neff and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and sentenced to concurrent prison terms of 15 to 30 years for each offense. He appeals as of right. We affirm.

I. Underlying Facts

Defendant was convicted of sexually assaulting his stepdaughter, aged 21 at the time of trial. The victim's mother married defendant in 1990, when the victim was eight years old. After the marriage, the victim lived with defendant and her mother. On weekends, defendant's daughter, Crystal Miller, would also stay in the home. According to the victim, defendant sexually assaulted her "[a]t least once a week, every two weeks" from age eight until she moved out of the house at age 18. The victim explained that the sexual assaults included inappropriate touching of her breasts, genitalia, and buttocks, oral sex, and digital and penile penetration of her vagina. The two charged incidents occurred in June 1998, and consisted of oral sex and digital penetration. The victim denied ever initiating any sexual contact with defendant, and denied that the incidents were consensual. The victim filed the complaint against defendant in April 2004.

The victim testified that the first sexual assault occurred after she accidentally walked into the bathroom as defendant was seated on the toilet while she and Crystal were playing hide-and-seek. Defendant allegedly told the victim, "Now, you owe me." About one week later, defendant allegedly reminded the victim about walking into the bathroom, led her into his bedroom, and asked her to lift her shirt. The victim did not comply, but defendant lifted her shirt, and sucked on her nipples. Defendant thereafter placed his hand down the victim's pants, and rubbed her clitoris. The victim indicated that oral sex also began when she was eight years

old, explaining that defendant would simply say, "suck it," or "[l]et me eat it," and then tell her what to do.

The victim testified that the sexual assaults occurred in various ways, at various locations. On one occasion, defendant drove her and Crystal near her elementary school. Crystal was asleep in the rear seat, and the victim was seated in the front seat. Defendant directed the victim to pull down her pants, and inserted his finger into her vagina. The victim testified that on another occasion, defendant had sexual intercourse with her after she asked him for money for a school fundraiser. The victim explained that defendant indicated that he would assist her if she had sex with him. Defendant then engaged in sexual intercourse with the victim, but was allegedly interrupted by someone arriving at the house. Defendant allegedly threw money at the victim, and told her that he "didn't even get to finish." The victim also described an occasion when defendant attempted anal intercourse.

The victim testified that, on several occasions when defendant requested her assistance in the garage, they would get into his 1957 Chevrolet that was parked in the garage, and engage in oral sex. The victim recalled that in 1998, when she was 15 years old, she was outside when defendant called her into the garage. When the victim went into the garage, defendant asked her to get into his Chevrolet so that he could perform oral sex on her. After the victim got inside the car, defendant licked her vagina, and digitally penetrated her vagina.

The victim indicated that, before reporting the incident in April 2004, she told "a couple of her friends" about the assaults when she was in the ninth grade. Jamie Gerendasy, one of the victim's friends, testified that she never saw defendant inappropriately touch the victim, but heard defendant make derogatory comments, heard defendant ask the victim to reveal her breasts once or twice, and saw defendant "smack" the victim's buttocks a couple of times. Gerendasy also indicated that, when she and the victim were in the ninth grade, the victim told her and two others about the alleged sexual abuse by defendant, and that she and the victim subsequently discussed it "a number of times." Crystal Stafford, a longtime friend of the victim, indicated that she lived in defendant's house for about nine months, from late 1999 until January 2000. Stafford never saw defendant inappropriately touch the victim, but, on five occasions, observed the victim coming out of a room where the victim and defendant had been alone, seemingly distraught, "wanting to be alone," "fixing her clothes," and "crying or wiping tears away." Stafford indicated that she and the victim discussed the victim's "sexual concerns" involving defendant, and the victim requested that she not disclose the information.

The victim first told her mother about the sexual assaults in April 2004. The victim explained that, after the first incident, defendant would make comments about her and her mother's former financial status, which she understood to mean that they would be "poor" again if she told anyone about the assaults. The victim's mother testified that she had seen defendant "pinch" the victim's breast on 20 to 30 occasions throughout the years, and the victim would pull away. Both the victim and her mother indicated that defendant often called the victim derogatory names, including "Pontiac hoe," stupid, and slut. The victim's mother testified that, although she suspected something, when she questioned the victim, the victim indicated that "it was just playing."

The defense denied any wrongdoing. Four defense witnesses, including defendant's former wife and his daughter, denied seeing inappropriate touching, or hearing any inappropriate comments between defendant and the victim, and indicated that the victim never avoided defendant. Crystal testified that defendant never asked the victim to expose herself, but noted that the victim would flash her chest to defendant and others, and initiate contact with defendant, including smacking his buttock, grabbing his chest, and punching his butt. She explained that the victim's actions would irritate defendant. Crystal also recalled the bathroom incident, and explained that, when the victim entered, defendant only yelled for her to leave.

II. Other Acts Evidence

Defendant first claims that the trial court abused its discretion by admitting evidence of uncharged sexual acts between defendant and the victim under MRE 404(b). We disagree.

Before trial, the prosecution filed notice and moved to admit evidence of defendant's other crimes or wrongs under MRE 404(b). The prosecution sought to admit evidence of uncharged sexual acts by defendant against the victim pursuant to *People v DerMartzex*, 390 Mich 410; 213 NW2d 97 (1973). The trial court granted the motion, and indicated that it would "limit the amount that comes in," and provide a limiting instruction.

A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000). If there is an underlying question of law, such as whether admissibility is precluded by a rule of evidence, we review that question of law de novo. *McDaniel*, *supra*.

MRE 404(b) prohibits "evidence of other crimes, wrongs, or acts" to prove a defendant's character or propensity to commit the charged crime. MRE 404(b)(1). But other acts evidence is admissible under MRE 404(b) if it is (1) offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice, pursuant to MRE 403. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

In *DerMartzex*, *supra* at 415, our Supreme Court held that evidence of other sexual acts between a defendant and his victim may be admissible if the defendant and the victim live in the same household and if, without such evidence, the victim's testimony would seem incredible. Noting that the credibility of the alleged victim is typically the principal issue in a CSC case, the Court explained that "[l]imiting [the victim's] testimony to the specific act charged and not allowing [the victim] to mention acts leading up to the assault would seriously undermine [the victim's] credibility in the eyes of the jury." *Id*. at 414-415. See also *Sabin (After Remand)*, *supra* at 69-70 ("evidence of uncharged acts of sexual misconduct perpetrated by the defendant on the complainant [is] admissible for the purpose of corroborating the complainant's testimony"). The Court noted, however, that evidence of prior sexual acts would not always be

admissible, and could be excluded if the prejudicial effect outweighed the probative value. *DerMartzex*, *supra* at 415.

Defendant has not demonstrated that the trial court's evidentiary ruling was an abuse of discretion. The evidence was not offered to show that defendant had a bad character. Rather, it assisted the jury in weighing the victim's credibility, particularly where defendant denied any wrongdoing. As in *DerMartzex*, limiting the victim's testimony to the two charged isolated acts would have seriously undermined the victim's credibility in the eyes of the jury. In brief, testimony that defendant suddenly sexually assaulted the victim in 1998, after having lived with her since 1990, would have seemed incredible without the testimony that the abuse began several years earlier, and continued until the victim moved out of the house in 2000. We therefore conclude that the evidence was relevant to the factual issues in this case.

Furthermore, the evidence was not inadmissible simply because the nature of the evidence is prejudicial, and defendant has not demonstrated that he was unfairly prejudiced by the evidence. See MRE 403. While the acts described are serious and incriminating, such characteristics are inherent in the underlying crimes for which defendant was accused. The danger that MRE 404(b)(1) seeks to avoid is that of *unfair* prejudice, not prejudice that stems only from the offensive nature of the crime itself. See *Starr*, *supra* at 499. Moreover, the trial court gave a cautionary instruction to the jury concerning the proper use of the other acts evidence, thereby limiting the potential for unfair prejudice. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Consequently, this issue does not warrant reversal.

III. Prosecutorial Misconduct

Next, defendant claims that he is entitled to a new trial because the prosecutor impermissibly denigrated his character. Defendant also contends that defense counsel was ineffective for failing to object to the prosecutor's misconduct. We disagree.

Generally, this Court reviews claims of prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). But because defendant failed to object to the prosecutor's conduct below, we review his unpreserved claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999). Our review is precluded unless the prejudicial effect could not have been cured by a timely instruction. *Rodriguez*, *supra.*

Defendant claims that the prosecutor denigrated his character by making the following emphasized remark during closing argument:

> Then we hear today from the defendant's ex-wife, Christina Mills. Frankly, I don't know why she testified. But then I thought about it and I thought, yeah, I do. It's quite interesting. We have a man who is today in court having to do with inappropriate dealing with teenagers and his ex-wife takes the stand and says they were dating since age 14 and got married at 16, and her grandmother agreed to that. *I don't know what that says to you, but that speaks volumes to me.* (Emphasis added.)

A prosecutor "must refrain from denigrating a defendant with intemperate and prejudicial remarks." *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995). Although the prosecutor's remark was arguably improper, as previously indicated, defendant did not object and, therefore, our review is limited to plain error affecting substantial rights. *Carines, supra*. Viewed in the context of the complete closing and rebuttal arguments, the prosecutor's remark did not affect defendant's substantial rights. The remark involved only a brief portion of the prosecutor's arguments, was of comparatively minor importance considering the totality of the evidence against defendant, and was not so inflammatory that defendant was prejudiced. Moreover, any prejudice that may have resulted could have been cured by a timely instruction. Indeed, the trial court instructed the jurors that the lawyers' comments are not evidence, and that the case should be decided on the basis of the evidence. The instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Consequently, reversal is not warranted on the basis of this unpreserved issue.

We also reject defendant's related claim that defense counsel was ineffective for failing to object to the prosecutor's alleged misconduct. Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

In light of our determination that the prosecutor's conduct did not deny defendant a fair trial, it follows that defense counsel's failure to object did not deprive defendant of the effective assistance of counsel. Additionally, the trial court's instructions adequately protected defendant's rights. In sum, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's inaction, the result of the proceeding would have been different. *Id*. Defendant is not entitled to a new trial on this basis.

IV. Sentence

A. *Blakely v Washington*

We reject defendant's claim that he must be resentenced because the trial court's factual findings supporting his score of 50 points for offense variable 12 (criminal sexual penetrations) were not determined by a jury, as mandated by *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In *Blakely*, the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme in which the sentencing judge was allowed to increase the defendant's maximum sentence on the basis of facts that were not reflected in the jury's verdict or admitted by the defendant. Our Supreme Court has stated

that the holding in *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Consequently, defendant's argument is without merit.

B. Proportionality

We also reject defendant's alternative claim that he is entitled to resentencing because his 15-year minimum sentence is disproportionate.[1] This Court reviews sentencing decisions for an abuse of discretion. A sentence constitutes an abuse of discretion if it violates the principle of proportionality by being disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Because defendant's 15-year minimum sentence is within the guidelines recommended range of 120 to 300 months, it is presumptively proportionate.[2] *People v Eberhardt*, 205 Mich App 587, 591; 518 NW2d 511 (1994). Although a sentence within the guidelines range could be disproportionate, *Milbourn, supra* at 661, defendant has failed to demonstrate any unusual circumstances to overcome the presumption of proportionality. Defendant is not entitled to resentencing.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Janet T. Neff
/s/ Donald S. Owens

[1] Because the offense of which defendant was convicted occurred before January 1, 1999, the former judicial sentencing guidelines apply to this case. MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 253-254; 611 NW2d 316 (2000).

[2] Defendant concedes that, even if the score for offense variable 12 was changed because of *Blakely*, *supra*, his 15-year minimum sentence "would have been within the newly-calculated range." (See defendant's brief, p 19.)